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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/005,092	12/05/2001	Yinghong Yu	13569.0018US01	8563
23552	7590	06/29/2005		
MERCHANT & GOULD PC P.O. BOX 2903 MINNEAPOLIS, MN 55402-0903			EXAMINER SCHAETZLE, KENNEDY	
			ART UNIT 3762	PAPER NUMBER

DATE MAILED: 06/29/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

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Office Action Summary	Application No. 10/005,092	Applicant(s) YU ET AL.	
	Examiner Kennedy Schaetzle	Art Unit 3762	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 26 May 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-76 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,2,6-12,15-22,27,28,32-38,41-48,52,53,57-63 and 66-73 is/are rejected.
- 7) ☒ Claim(s) 3-5,13,14,23-26,29-31,39,40,49-51,54-56,64,65 and 74-76 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 05 December 2001 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on May 26, 2005 has been entered.

Double Patenting

2. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

3. Claims 1, 11, 12, 15, 17, 27, 37, 38, 41, 43, 52, 62, 63, 66 and 68 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 4-7, 13 and 15-17 of copending Application No. 10/236,714. Although the conflicting claims are not identical, they are not patentably distinct from each other because present claim 1 is merely a broader version of the subject matter covered by claims 13 and 15 presented in the '714 application. Likewise, claims 27 and 52 of the present application is merely a broader version of the subject matter covered by claims 4 and 7, or 16 and 17, presented in the '714 application. Assuming the '714 invention receives a patent, the applicant would not be

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entitled to receive a patent for the generic or broader invention (*In re Goodman*, 11 F. 3d 1046, 29 USPQ 2d 2010 (Fed. Cir. 1993)).

Regarding claims with limitations of the type found in claims 11 and 12, those of ordinary skill in the art would have seen the particular landmark or fiducial points from which to base phase difference measurement to be a matter of obvious design. Clearly any recurrent feature of the waveform signifying a contraction such as the onset of contraction or the peak of a contraction signal could have been used as long as the point selection was consistently applied from one accelerometer output to the other.

Regarding claim 15 and claims with similar limitations, the examiner considers it inherent that an accelerometer continuously senses motion during consecutive cardiac cycles by virtue of the fact that the piezoelectric material will by its physical nature produce an electrical signal indicative of motion any time the heart contracts.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

4. Claims 1, 2, 6-12, 15-22, 27, 28, 32-38, 41-48, 53, 57-63 and 66-73 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-18 of copending Application No. 10/206,131. Although the conflicting claims are not identical, they are not patentably distinct from each other because present claim 1 is merely a broader version of the subject matter covered by claims 10-18 presented in the '131 application. Likewise, claims 27 and 52 of the present application is merely a broader version of the subject matter covered by claims 1-9, presented in the '131 application. Assuming the '131 invention receives a patent, the applicant would not be entitled to receive a patent for the generic or broader invention (*In re Goodman*, 11 F. 3d 1046, 29 USPQ 2d 2010 (Fed. Cir. 1993)).

Regarding claims with limitations of the type found in claims 11 and 12, those of ordinary skill in the art would have seen the particular landmark or fiducial points from which to base phase difference measurement to be a matter of obvious design. Clearly any recurrent feature of the waveform signifying a contraction such as the onset of

contraction or the peak of a contraction signal could have been used as long as the point selection was consistently applied from one accelerometer output to the other.

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This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Allowable Subject Matter

5. Claims 3-5, 13, 14, 23-26, 29-31, 39, 40, 49-51, 54-56, 64, 65 and 74-76 would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Response to Arguments

6. Applicant's arguments filed May 26, 2005 have been fully considered but they are not persuasive.

The applicant argues that because the filing date of the 10/206,131 application used in support of the double patenting rejection is over seven months after the filing date of the present application, the examiner is incorrect in applying the reference against the present, earlier filed invention. The applicant further quotes MPEP §706.02(k) to support his assertion.

The examiner counters that filing dates are immaterial to the question of double patenting. The section of the MPEP quoted by the applicant applies only to obviousness-type *prior art* rejections under 35 U.S.C. 102(e)/103, and not obviousness-type double patenting rejections based on copending applications by the same applicant. As stated above in paragraph 2 and as repeated in prior Office Actions, a timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

The examiner also wishes to remind the applicant that a double patenting rejection was also made based on application Serial No. 10/236,714. A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome this rejection as well.

Conclusion

7. All claims are drawn to the same invention claimed in the application prior to the entry of the submission under 37 CFR 1.114 and could have been finally rejected on the grounds and art of record in the next Office action if they had been entered in the application prior to entry under 37 CFR 1.114. Accordingly, **THIS ACTION IS MADE FINAL** even though it is a first action after the filing of a request for continued examination and the submission under 37 CFR 1.114. See MPEP § 706.07(b). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

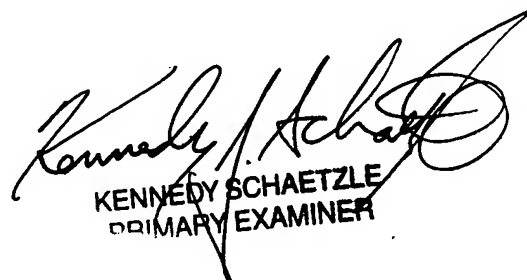
8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kennedy Schaetzle whose telephone number is 703 308-2211. The examiner can normally be reached M-F 9:30-6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Angela Sykes can be reached at 703 308-5181. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

KJS
June 25, 2005



KENNEDY SCHAEZLE
PRIMARY EXAMINER